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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 697.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER
In Support of Petition for Certiorari.

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INTRODUCTION.

Petitioner believes that most of the points and contentions advanced in respondent's brief[*] are adequately covered in the petition for certiorari, so that no detailed rejoinder is here necessary. However, since respondent would apparently have this Court believe that the decisions of the courts below are fully supported by well-settled and long-standing legal principles, and is unwilling to concede even the existence of novel questions of law, petitioner submits the following brief comments.

[*] Hereinafter cited as "RB."

ARGUMENT.

This is a Case of First Impression. The only case cited by respondent in support of the imputed negligence charge (Question No. 1) is *Baltimore and Ohio Railroad Company v. Alpha Portland Cement Co.*, 218 F. 2d 207 (C. A. 3d, 1955). However, as noted in Judge O'Sullivan's dissent below (Petition for Certiorari, pp. 32-3), that case is distinguishable upon the ground, among numerous others, that it was a suit for *indemnity* (following settlement in the employee's action), in which the question of the railroad's negligence with respect to its employee was never tried out. It could not, therefore, and *did* not involve any imputed negligence charge. The language from the opinion quoted at page 10 of respondent's brief is thus nothing more than the court's gratuitous characterization of the nature of the railroad's underlying FELA liability; it expresses a concept which was neither urged upon the court nor necessary to the decision. Hence, the *Alpha* case could not have been, and *is* not, a precedent for the charge given in the instant case.

One would suppose from the bland, confident tone of respondent's brief that the books would abound with FELA cases approving the imputation of negligence on facts similar to this case. Respondent's failure to cite a single authority makes crystal clear, however, that this case breaks new and uncharted ground so far as railroad liability is concerned.

The Common Law Cases. Respondent seemingly concedes (RB 5) that *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326 (1958) is factually not in point. It is said, however, that the common law cases cited in *Sinkler*, *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875

(1907); *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796 (1900); *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705 (1883); *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133 (1892), and *Ft. Worth & D. C. R. Co. v. Smith*, 39 Tex. Civ. App. 92, 87 S. W. 371 (1905), are controlling, in that each of them "involved a railroad employee who was injured by reason of a defective track or a fouled and obstructed track owned or controlled or maintained by a third party." (RB 5.)

Without exception, however, each of these earlier decisions involved injuries arising out of *publicly franchised* operations of the defendant, rather than the maintenance of private sidetracks. Thus, none of them can be regarded as authority for extending the imputed negligence theory beyond the facts of the *Sinkler* case, since they all turn upon a railroad's responsibility for injuries arising out of *common carrier* activities delegated to *other railroads*. Even on *that* point, as noted in the *Sinkler* case, authority at common law was very much divided. See 356 U. S. at 329 n. 3; *Brady v. Chicago & G. W. Ry. Co.*, 114 Fed. 100, at 110-111 (C. C. A. 8th, 1902), and cases there cited. So far as petitioner can determine, there are *no* common law authorities extending railroad liability to the facts of the present case. Such cases as there are appear to have reached a contrary result. *Engel v. New York, P. & B. R. Co.*, 160 Mass. 260, 35 N. E. 547 (1893; opinion by Mr. Justice Holmes). Indeed, at common law, railroads were frequently held not liable for defects in *their own* sidetracks, let alone those of third-party industries. See 26 *Cyc.* 1127 (1905), 39 *Corpus Juris*, Master and Servant, § 508, p. 392 (1925), and 51 *Corpus Juris*, Railroads, § 1177, p. 1109 (1930).

The Ward Case. In a tortured effort to reconcile *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396 (1960), with the decisions below, respondent would have this Court believe that its square holding there—that the industry's maintenance of its own sidetrack did not make it the "agent" of the railroad for FELA purposes—is somehow related to whether Ward was an "employee" of the railroad (contrary to respondent's assertion, this was very much an open question) rather than to the latter's liability for the industry's negligence. Yet the word "agent" appears only once in the FELA, in the phrase which makes a railroad liable for the negligence of any of its "officers, *agents* or employees." Thus, this Court's holding can mean only that the railroad was not liable to plaintiff (assuming him to have been a railroad employee) for the industry's negligence, the precise issue herein involved.

No fluency of verbiage can obscure the factual parallel between *Ward* and the present case, the direct and head-on conflict between their respective holdings, or the cogency of Judge O'Sullivan's consideration of *Ward* in its controlling application to the case at bar.

The Statutes Requiring Switch Connections (RB 11-12). Respondent misconstrues the effect of these statutes (49 U. S. C. § 1[9] and West Virginia Code, 1955, § 2563) and the purpose for which they were cited. It is not true, as respondent states, that petitioner's carrier responsibilities end with the construction and operation of a switch, leaving intra-plant switching to the connecting industry. On the contrary, although its track *maintenance* ends at the switch, a railroad is legally obligated as a common carrier to spot cars on sidetracks like SUCO's once they are built by the industry. *U. S. v. American Sheet & Tinplate Co.*, 301 U. S. 402, 409-411 (1937). Thus, petitioner

could not legally require (and did not obtain) an indemnity agreement in this case as the price of its spotting services. Contrary to respondent's assertion, it follows that petitioner may well be without effective recourse if saddled with this new species of liability without fault. But more importantly, the authorities respecting petitioner's common carrier duties make clear that the "operational activities" rule of the *Sinkler* case does not extend to sidetrack maintenance, with the result that industry negligence in that regard cannot be imputed to petitioner.

The So-called "Policy" Question. Under this heading (RB 2-4), respondent describes the dire consequences to railroad employees which will ensue if the rule of vicarious liability is not extended to the facts of this case. Assuming that policy questions of this sort may properly be determined by this Court rather than by Congress, respondent's contentions in this regard distort both the realities of railroading and the law applicable to this case. Thus, respondent details the record evidence which is claimed to demonstrate petitioner's abdication of responsibility, and its lack of concern for the condition of the SUCO sidetrack, arguing that petitioner should not be permitted by this device to insulate itself from liability. The fallacy of this line of argument, however, is that that evidence relates to the railroad's *own* failure to exercise ordinary care, rather than to the question of its *vicarious* liability for the industry's fault. If a railroad, with total indifference to the safety of its employees, entirely washes its hands of responsibility for the condition of industrial sidetracks, can it reasonably be supposed that a Court or jury will absolve it of liability to an employee thereby injured? In this case, petitioner *concedes* that there was evidence from which a jury could conclude that *petitioner*

could have foreseen and prevented the accident. There are numerous FELA cases in which just such evidence has been found by juries to justify employee verdicts without the crutch of imputed negligence. See, *e.g.*: *Terminal R. Association of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. C. A. 8th, 1948); *Chesapeake & Ohio R. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4th, 1952); and *Atlantic Coast Line R. Co. v. Robertson*, 214 F. 2d 746 (C. A. 4th, 1954). Thus, there is no question here, as respondent implies, of denuding Ralph Payne of protection under the FELA. The inescapable question does, however, remain in the case at bar:—How can the comparative negligence of respondent's decedent, assessed by the jury at 13% of the total negligence, be properly measured under § 3 of the FELA (45 U. S. C. § 3) when the negligence of SUCO, without concern for its weight in the scale, is charged to petitioner by imputation, without opportunity for separate consideration or measurement?

CONCLUSION.

In view of the importance and volume of FELA litigation in the nation's courts, it would be a disservice to the profession to terminate this case with an enigmatic denial of certiorari, thus leaving the concept embraced by the district-judge majority below, revolutionary in the light of *Ward* and other federal appellate authorities, to hang as an unresolved question mark over future FELA trials. This Court should therefore admit this case for a full hearing on the merits.

Respectfully submitted,

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Counsel for Petitioner.

Dated January 28, 1963.